Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT BEAM RUNYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DOES THE FIFTH CIRCUIT'S DECISION TO DENY COA CONFLICT WITH THIS COURT'S RULE IN *MILLER-EL V. COCKRELL*, 537 U.S. 322, 336-37 (2003), THAT LOWER COURTS MAY NOT DENY COA BY FIRST DECIDING THE MERITS OF THE APPEAL?

DOES THE FIFTH CIRCUIT'S DECISION TO DENY COA CONFLICT WITH THIS COURT'S RULE *IN HARRIS V. NELSON*, 394 U.S. 286, 291 (1969), REQUIRING THAT SECTION 2255 MOVANTS BE GIVEN A FAIR OPPORTUNITY TO DEVELOP THEIR EVIDENCE?

INTERESTED PARTIES

1. Petitioner: Robert Beam Runyan

2. Respondent: United States of America

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4. Counsel for Respondent: Paul D. Clement, Solicitor General of the United States, U.S. Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, (202) 514-2217

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Beam Runyan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Court of Appeals unpublished decision, *United States v. Runyan*, No. 05-10458 (5th Cir. June 12, 2006), is located at **Appendix A**. Petitioner filed a timely suggestion for panel rehearing from the Court of Appeals' decision, which was denied on August 1, 2006. **Appendix B.**

JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C. § 2255. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Due to judicial bias, Governmental suppression of exculpatory evidence, and the curtailment of a fair and proper opportunity to present a defense at trial, on appeal, and in post-conviction review, Runyan languishes in illegal confinement.

1. Pre-Trial Developments.

Runyan was indicted on October 13, 1999, with two counts of sexual exploitation of children under 18 U.S.C. § 2251, one count each of distribution and receipt of child pornography under 18 U.S.C. § 2252A(a)(2), possession of child pornography under 18 U.S.C. § 2252A(5)(B), and one count of forfeiture under 18 U.S.C. § 982. The Government made several plea offers, the final one occurring on April 7, 2000, wherein the Government conveyed a formal written document to trial counsel, J.W. Johnson, agreeing (with the cooperation of the state District Attorney) to dismiss remaining federal counts and all of the current indictments pending against Runyan in state court in return for Runyan's federal court plea of guilty to Possession of Child Pornography, a sentence of no more than five years in accordance with the federal sentencing guidelines; and a fine of no more than $250,000.00. The trial court rejected this final proposed plea agreement on Tuesday, April 11, 2000, without a hearing. At the Government's motion, the trial court dismissed Counts 2 and 6 on April 14, 2000.

A jury trial took place from April 17, 2000, to April 21, 2000. The Government was represented by Mr. Chad Meacham and Ms. Tanya Pierce. Lead retained counsel for Runyan was Mr. J.W. Johnson, who had replaced Mr. Floyd Holder as lead counsel six months prior to the trial.

However, Holder was still counsel of record as of the day of pretrial hearings and jury selection. Just prior to the beginning of the trial on April 17th, Holder approached the trial court and conveyed the following information to the court in chambers, ex parte, and without notification to Johnson of his intended course of conduct:

> Since the date Mr. Johnson was employed . . . I have had no contact with the client. I have been helping Mr. Johnson with federal rules and procedural questions and questions of law.
>
> The plea that was arrived at and scheduled to be given last Tuesday was not acceptable to the Court, and we began to get ready for trial. I became concerned about the shape that the evidence appeared to be taking, and expressed those concerns to Mr. Johnson stating that they were inconsistent with the facts that I believed them to be. I did advise Mr. Johnson that if Mr. Runyan took the witness stand and related facts consistent with what I perceived the defense to be shaping up to be, that I would have an affirmative duty to advise the Court that a fraud was being committed on the Court, and my services had been used to fabricate this fraud, and urged with the utmost suasion that he urge Mr. Runyan not to testify, because should he do so, I would have no question or no option but to notify the Court.
>
> I was advised Saturday afternoon that I was mistaken as to the facts, and that Mr. Runyan did intend to testify. I advised Mr. Johnson I would have no option but to ask the Court to let me withdraw, and urged him once again not to let Mr. Runyan testify, and that if he did I would have no option but to come to the Court and explain exactly what the facts were that I thought to be, and I would ask the Court at this time to permit me to be excused. And should the defense,

> despite my exhortations, decide to put Mr. Runyan on, I would come down and relate to the Court or to – I would just simply try to put things right.

1R88-90; 7R2-4.[1] The court granted Holder's motion. 1R90; 7R4. Holder responded that he would ask the Government prosecutors to let him know when they were to rest, and he would "head back this way." 1R90; 7R4. Runyan did not testify. On April 21, the jury returned a verdict of guilty on all four remaining counts. On July 28, 2000, the court sentenced Runyan to a term of imprisonment of 300 months, supervised release for a term of three years, and a special assessment of $400.00.

2. Summary of Evidence Presented at Trial.

In the summer of 1995, Runyan's wife, Judith Runyan and her daughter Rickie Adams moved to Brownwood. Runyan's main business office was in Coleman. Runyan's ranch was between Coleman and Santa Ana. Runyan had a secondary office in Brownwood. The family would meet in Brownwood and at the ranch. 9R120-21. Runyan closed his business and began working in Fredericksburg in January 1998, where he worked for a year. *Id.* at 121-22. He maintained offices in the Coleman State Bank during that time. *Id.* In January 1999, Judith separated from Runyan. *Id.* at 88, 120-24.

Runyan filed for divorce in May 1999, and an attorney told Judith to retrieve all of her personal property. 9R129-32. On June 18, 2000, Judith went to the ranch house with daughter Rickie and some friends. *Id.* at 91-92; 158. They entered the barn, where they discovered a black bag with pornography in it, a vibrator, and a Polaroid camera. *Id.* at

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[1] This colloquy was not supplied to Johnson until on or about March 15, 2001 (the date it was faxed from the United States Attorneys Office) and Johnson did not know of its contents until some date after it was received at his office.

93-98. Some developed Polaroid photos also were found which depicted a naked Misty Metcalf. *Id.* The settings for the photos were Runyan's office area in the Coleman State Bank and the Runyan ranch house. Two additional boxes contained lingerie and pornography videos. *Id.* at 160-63. *Id.* Judith put the material in a storage unit. *Id.* at 103, 163-67.

On the next day, Judith and friends moved more things from the ranch. 9R167-73. Included were a desktop computer from Runyan's ranch bedroom and recordable CDs, floppy disks, and zip drives from near the computer that Judith wished to search for financial material. *Id.* at 105-07; 186-89; 208-16. On the CDs, pictures were found of little boys involved in sexual activity with each other. *Id.* at 208-16.

The sheriff was contacted. Over several days, materials retrieved from the storage unit, the materials found near the computer, the Polaroids, and the computer were turned over to law enforcement agents. 9R107-10; 1[illegible] 91. The final batch of CDs were turned over on July 7th. *Id.* at 202. Judith later turned over a laptop computer, formerly owned by Runyan but then in Rickie's possession, to federal customs agent Nuckles. *Id.* at 110-12.

Misty Metcalf claimed that, when she was twelve, she began to mow the grass at Runyan's ranch and clean his office. 9R229. She claimed that Runyan recruited her to pose for pornographic photos, saying he would make money by selling the photos to persons in Japan. *Id.* at 233-34. The Polaroid photos of her were when she was 15 or 16 years old. *Id.* at 237, 84.

Metcalf denied ever having been at Runyan's ranch, downloading pornography, while Runyan was gone, or having ever looked at pornography on the computer she shared with her boyfriend Nathan Wood more than once or twice. *Id.* at 265-67; 273. She denied knowing how to download pornography, although admitting that she had

taken computer classes since elementary school. *Id.* at 266; 280. She denied creating files on a computer she shared with Wood which were entitled, "Me one, Me two, ..." *Id.* at 269. She denied that photos in those files looked similar to her and that she had solicited men for sex over the internet. *Id.* at 269-70.

Metcalf then admitted that Wood taught her in 1999 how to scan photographs onto the computer. 9R308-24. She admitted using internet chat rooms and that, as a result, she arranged meetings with three men at her apartment. Before the third man had come, Wood taught her to put her picture on the internet. *Id.*

Nathan Wood testified that he knew Runyan for three years. 11R624-26. He and Metcalf (a year younger in age) became sexually intimate when she was 15. *Id.* at 626-28. During Wood's five year relationship with Metcalf, she used his computers to do a lot of chat room cyber sex. *Id.* at 631. Metcalf also went to Runyan's office in Coleman and out to Runyan's ranch twice a week. *Id.* at 632-34. She would play on Runyan's office computers and go to the ranch for long periods when Wood assumed Runyan was not present, because Runyan was going back and forth to Fredericksburg at the time. *Id.*

Metcalf would send pornography pictures to people on the internet, falsely claiming they were of her. 11R655-66. She created files containing these photos, labeled "Me one, Me two, Me three, etc." *Id.* at 649. Metcalf was good at hiding things. *Id.* at 650. Men came from out of town to visit Metcalf, and she took phone calls from all over the country. *Id.* at 651-52. Metcalf prostituted herself, taking advantage of people, including Runyan. *Id.* at 655. Wood sold his present computer, which he had shared with Metcalf, to Runyan's trial investigator. 11R642-44.

Wood's great grandmother, S.E. Powell, testified that Metcalf stayed at her house for two weeks, and Metcalf would get up at noon, go straight to the computer and never come up for air, all day and all night long. 11R697.

Powell had never heard Metcalf make a truthful statement. *Id.* at 699.

Texas Ranger Bobby Grubbs presented evidence that Runyan told him he discovered pornography at a roadside park and planned to store it in his barn only until he could burn it when a burn ban was lifted. 10R418-21; 440. A friend of Runyan's, Don Henderson, also testified that near the middle of February 1999, he received a phone call from Runyan wherein Runyan told him he had found a bunch of pornography on CDs in trash thrown beneath the Colorado River bridge in a park. 11R735. He said Runyan told him he put the CDs in his computer and found some "pretty rank crap" which he was going to burn. *Id.* For two years there was a burn ban in Coleman County and it was in place in February through April of 1999. *Id.* at 737-38.

Customs agent Rick Nuckles delivered the desktop computer from the ranch house and the laptop which had been in Rickie's possession to Tim Wargo, senior special agent for the Customs Service computer forensics squad, for inspection. 10R451-55; 523-31. Nuckles inspected the CDs, floppy disks and zip drives. *Id.* at 451-55. He found child pornography on the 3.5 inch floppy disks and two CDs had photos of Misty Metcalf on them made with a digital camera. *Id.* at 455-64. Pursuant to a search warrant executed on June 21, Nuckles seized a backup tape from the ranch office area with "Bob's Notebook" written on it. *Id.* at 464-66. The backup tape contained 13,500 child pornography images of which 30-45 percent were teens. *Id.* at 478. No pictures of Metcalf were on backup tape. *Id.* at 479; 523-31. Nuckles could not tie together the desktop from the Runyan ranch residence and Rickie's laptop as having a single download record (in common). 10R496. Runyan's banking records looked normal even though Metcalf claimed that he was selling child pornography. *Id.* at 531. No evidence was found anywhere that Runyan made any income from the sale of child pornography. *Id.* at 532.

Wargo testified that he found only one image on the desktop computer that seemed to be child pornography. 10R558-70. The computer, which had a standard internal modem, was loaded with adult pornography and its download log showed visitation to (mostly teen) child pornography newsgroups. *Id.* at 563-71. Wargo found three photos on Rickie's laptop that he considered child pornography. *Id.* at 571, 596-610.

Chauncey Green, the defense computer expert, obtained a printout of directories, folders, and files that were taken from the CDs, zip drives, diskettes, and backup tapes that the Government alleged to belong to Runyan. *Id.* at 11R765-68. Green compared the days and dates of a five-day workweek in 1998 with the computer calendar dates, from Feb. 1, 1998 to Dec. 31, 1998. *Id.* at 769-70. Nine hundred and ninety-nine of the image creation and modification dates were on workdays during the time Runyan worked in Frederickburg. *Id.* at 770. Green concluded that someone other than Runyan downloaded them. *Id.* at 778-80. Green opined that downloading these kinds of files would be *very* time consuming – hours, days, weeks – and that it was unlikely the dates were falsified. *Id.* The CDs could have been created by anyone with a modem and CD burner on a desktop or laptop. *Id.* at 782-83. The image CDs were not made on the Runyan ranch computer, because they would have been found to exist on the hard drive somewhere. 13,000 files could not go through a computer and just vanish. *Id.* Green likewise found no evidence of these files having passed through Runyan's laptop (from his stepdaughter) or the Wood computer, and concluded that none of the Government's evidence was made on any of the three computers in custody. *Id.* at 783-84. Green disagreed with Wargo's testimony that there were ways of circumventing the hard drive by downloading directly from the internet to CD. *Id.* Green admitted that, assuming Runyan always had up-to-date laptops and a modem for the internet, the 999 files

could have been created by him anywhere there was a phone line. *Id.* at 801-02. On a regular phone line, however, it would take a *long time* – a minute – to download each of at least 13,000 photos of alleged child pornography. *Id.* at 803.

Green also analyzed the hard drive of the computer Wood had shared with Metcalf. 11R771-72. He found graphic image files on the computer, labeled "Me one, . . . Me six." All contained a picture of the same nude young woman. *Id.* When Green found some images of child pornography, he notified trial counsel Johnson. *Id.* at 773-76. The child pornography images were purposefully stored. *Id.* Johnson told Green to surrender the machine to Customs, which was done the next day. *Id.* Green was told he could not access Wood's drive again until Wargo completed his examination of it. *Id.* Green estimated that the Wood computer contained fifteen saved folders with 1500 images. He had passed through about 200 to 300 pictures, mainly of teens, before he reached the bestiality and child pornography. 11R777-79. Then he ceased searching. *Id.* Pursuant to a Customs order, he destroyed a mirror image of the hard drive he had made. *Id.* Green added that the child pornography that he saw on the Wood computer looked like photos on the backup tape labeled "Bob's Notebook." They were very similar, involving 11-12 year old girls. 11R796-98. Green noted that the backup tape could be written over and over, was portable, and could be used from one computer to another. Someone (other than Runyan) could have downloaded pornography onto it, using it like an audiotape. *Id.* at 787-88.

After Green turned the Wood computer over and destroyed his mirror image of its hard drive, the defense had no further access to that hard drive until after Runyan's trial. The defense protested, as has been noted, its lack of access to the evidence and slowness of the Government experts to process it. Nuckles finally testified that, only the night before, he had finished reviewing a diskette

sent him by Wargo the previous week, finding some questionable images, but no five or six year old child pornography. 11R831-33. No images were printed. *Id.* Defense counsel accused Nuckles of preventing the defense from being able to make a case by holding himself as the "sole and exclusive judge of what was pornography or what wasn't or what was not child pornography on Nathan Wood's computer." *Id.*

3. Appeal and Motion for New Trial Developments.

Runyan appealed his conviction and sentence to the Fifth Circuit Court of Appeals. On August 20, 2001, Runyan filed a Motion for New Trial asserting that "newly discovered or newly available evidence show[ed] that the Defendant was not permitted to present his full defense to the jury."

The defense trial theory was that Metcalf (alone or with others besides Runyan) took the underage photographs of her and put the child pornography on the computer in Runyan's house. 1SR2-4. Trial counsel wanted to use the actual child pornography images on Metcalf's and Wood's shared computer to impeach her denial that she had downloaded pornography of any kind and to graphically show (e.g., through similar poses between the "me one, me two" photos and those of Metcalf in the items at Runyan's farmhouse), that she alone could have been responsible for the evidence found on Runyan's computers. Taking at face value agent Nuckles' assurance there were no exculpatory images on the computer, the trial court refused to examine the computer *in-camera* and prevented Runyan from presenting the jury with the evidence. 11R831. The trial court denied Runyan's motions for *in camera* inspection of the hard drive images and for production of those images as exculpatory evidence, filed on the second and fourth days of trial. The court only allowed the defense expert to testify that he found images of a questionable nature, permitting no images to go to the

jury, and preventing proper identification of the images as those of children. 11R773-74.

Given Nuckles' testimony that there was no exculpatory evidence on Metcalf's and Wood's hard drive, a mirror image was released to appellate counsel. 1SR5. Thereafter, hundreds of images were found on the hard drive of females that counsel believed were possibly under age. Thirty-three images were printed and sent to two board certified pediatricians with extensive experience examining adolescent females. *Id.* at 6. Both doctors gave expert opinions to a reasonable medical certainty that at least ten of the images were of girls under age 16. *Id.* at 7. Both experts assigned an age of under 16 to the girl depicted in images corresponding to the "me one, me two" documents. *Id.*

Runyan requested a hearing before the trial court. *Id.* at 9. Runyan asserted that, had the court been aware that the physical evidence existed that, contrary to her testimony, Metcalf had downloaded many illegal images to her computer during the relevant time period, it should have allowed Runyan to present that evidence to the jury as a matter of defense. *Id.* at 8. Runyan alleged a violation of his Sixth Amendment right to present his defense and a violation of his Fifth Amendment due process rights by Government suppression of material, exculpatory evidence. *Id.* On August 20, 2001, Runyan moved for abatement of his appeal and for temporary remand to the trial court for a hearing on the Motion for New Trial. On August 30, 2001, the Fifth Circuit ordered the motion carried with the case. On September 7, 2001, the trial court denied the motion for new trial without a hearing. Runyan moved for consolidation of the initial and motion for new trial appeals, which was granted.

Runyan argued on appeal that he should have been afforded a hearing on whether the defense expert had full access to the Wood computer at trial and, pointedly,

whether "it would have been a different trial had the defense presented to the jury the printed images contained in sealed Exhibits 6-38." *Id.* at 18-19. He pointed out that the evidence in the sealed exhibits supported the theory that someone other than Runyan took the photos of Metcalf and that Metcalf appeared to have learned the poses from certain of the sealed images. *Id.* at 8.

On December 10, 2001, the Fifth Circuit held that portions of the pre-warrant search by law enforcement officials violated the Fourth Amendment, and remanded to the trial court for further fact findings on the applicability of the independent source doctrine, an exception to the exclusionary rule. *United States v. Runyan*, 275 F.3d 449, 468 (5th Cir. 2001). The trial court held a hearing and issued findings. Upon return, on April 18, 2002, the Fifth Circuit held that the independent source exception to the exclusionary rule existed, and affirmed Runyan's convictions for receipt and possession of child pornography and for sexual exploitation of a child, but reversed his conviction for distribution of child pornography. *United States v. Runyan*, 290 F.3d 223 (5th Cir. 2002). The Court also denied Motion for New Trial relief, finding that Runyan failed to prove *Brady* materiality. *Id.* at 247. The Court found that Runyan's post-trial expert analysis "only verified [the] information" already presented to the jury by the defense computer expert and the Customs agent, and that presentation of the expert analysis would not have affected the outcome. *Id.* at 247-48.[2] The Court vacated

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[2] Runyan believes the Fifth Circuit erred by neglecting the point that the jury should have been allowed to view the very relevant images from Metcalf's computer themselves ***because the experts confirmed*** they were of underage females. The experts' access to the evidence, in other words, was a necessary step toward having the images themselves published to the jury. The images were the exculpatory evidence and the trial court's prevention of the jury from seeing those images violated Runyan's rights to due process and to present a defense. *See Holmes v. South Carolina*, 126 S. Ct. 1727 (2006) (holding trial court erred by focusing on the strength of the prosecution's case, rather than

(Continued on following page)

Runyan's sentence and remanded to the trial court for entry of judgment and re-sentencing. *Id.* at 252. Rehearing was denied on May 17, 2002.

Runyan filed a petition for writ of certiorari, which was denied on October 7, 2002. *Runyan v. United States*, No. 02-232 (Oct. 7, 2002) (unpublished order).

On August 30, 2002, the trial court entered a new judgment revising Runyan's sentence to a term of 240 months as to Count One and 180 months as to each of Counts Four and Five, all terms to run consecutively. Runyan timely appealed. By per curiam order, The Fifth Circuit denied relief on March 7, 2003. *United States v. Runyan*, No. 02-10995 (5th Cir. Mar. 7, 2003) (unpublished order).

4. Post-Conviction Review.

On June 4, 2004, Runyan filed his Motion to Vacate under 28 U.S.C. § 2255. He raised three claims: (1) He had been tried by a judge harboring actual bias against him in violation of the due process clause of the Fifth Amendment; (2) Floyd Holder's *in camera*, ex parte communication with that judge caused the judge to be biased against him, violating his right to effective assistance of trial counsel; and (3) J.W. Johnson's failure to timely pursue a very favorable plea agreement also violated his right to effective assistance of trial counsel. Runyan specifically requested an evidentiary hearing. In support of his claim that his due process rights had been violated by the actual bias of the trial judge, Runyan argued as follows:

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the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt).

> A genuine question as to this Court's impartiality is raised by the unusual circumstances of Runyan's trial – specifically this Court's trial decisions when viewed in light of Floyd Holder's *ex parte*, *in camera* assertion, just prior to trial, that Runyan intended to commit fraud upon this Court and the jury. It is doubtful that any "average man as judge" could fairly adjudicate a case following such a bombshell from counsel delivered in secret. In essence, this Court was actually biased against Runyan because trial counsel's (Holder's) *in camera* communication – *unknown to counsel who was actually representing Runyan (Mr. Johnson) and conducting the trial* – caused this Court to have an opinion of Runyan that "rest[ed] upon knowledge that [this Court] ought not to [have] possess[ed]" which this Court also expressed with a high degree of antagonism during the course of the trial.

Petition at 38-39.

Citing *Liteky v. United States*, 510 U.S. 540, 550, 555 (1994), Runyan pointed out that he had been prevented from exercising his statutory right to move for recusal because trial counsel (Mr. Johnson) had not been told by the Court or Mr. Holder that Mr. Holder told the court Runyan was going to commit fraud. Petition at 39 n.5. Statutory grounds for recusal include knowledge that a court ought not to possess. *Liteky*, 510 U.S. at 550. Runyan informed the court that, ethically, Mr. Holder should have resigned from the case without unnecessarily violating the attorney-client privilege and conveying to the court his opinion (alone, not an established fact) about Runyan's plans to testify. *United States v. Scott*, 909 F.2d 488, 492, 494 n.10 (11th Cir. 1990). The court gained knowledge that it ought not possess, and it was the sort of knowledge which would have caused "the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused." Petition at 38 (quoting *Tumey v.*

Ohio, 273 U.S. 510, 532 (1927)). This constituted a violation of due process which played out at trial as the court made one after another hostile (and at times erroneous) evidentiary decisions. *Tumey*, 273 U.S. at 532.

At the same time, Runyan clearly distinguished *Liteky* as a statutory case, providing grounds for recusal, from his own case wherein he was alleging that the trial court was actually biased against him by Holder's action. Petition at 39 n.5 (quoting *United States v. Donato*, 99 F.3d 426, 434 (D.C. Cir. 1997) ("*Liteky*, however, was a statutory case, where the claim was that the trial judge should have recused himself. Donato's claim is different. She claims that the district court judge displayed such bias against her and her attorney that she did not receive a fair trial."). Runyan offered strong evidence of actual bias.

a. The trial court failed to exercise its substantial duty to protect Runyan's rights by finding out if his trial counsel knew what Mr. Holder had told the court.

"[O]ne of the clearest indications of bias" was the trial court's failure to exercise its substantial duty to assure that Runyan's rights were guarded once Mr. Holder had betrayed client confidences to the court and told the court Runyan intended to commit fraud. Certainly, the Eighth Circuit's expression of that duty, as presented to the trial court, constitutes an opinion of reasonable jurists:

> The most weighty decision in a case of possible client perjury is made by the lawyer who decides to inform the court, and perhaps incidentally his adversary and the jury, of his client's possible perjury. This occurs when the lawyer makes a motion for withdrawal (usually for unstated reasons) or allows his client to testify in narrative form without questioning from counsel. Once this has been done, the die is cast. The prejudice will have occurred. At a minimum, the

> trial court will know of the defendant's potential perjury. For this reason, defense counsel must use extreme caution before revealing a belief of impending perjury. It is, as Justice Blackmun noted, the "rarest of cases" where an attorney should take such action. Once the disclosure of the potential client perjury has occurred, the trial judge can limit the resulting prejudice by preventing further disclosures of client confidences, by informing the attorney of the obligation to his client, and by informing the client of her rights and determining whether she desires to waive any of them.

Petition at 40-41 (quoting *United States v. Long*, 857 F.2d 436, 447 (8th Cir. 1988)). The Record leaves no room for any other conclusion than that the trial court was "prejudiced" by Mr. Holder's act, which had been unnecessary in itself, and that the trial court made no effort to ascertain whether Mr. Johnson knew what Mr. Holder had conveyed and made no effort to protect Runyan's rights. On this record *alone*, it was unreasonable for Judge Reavley to deny COA upon finding "no evidence" in the Record of "bias or impropriety of the district judge." *See infra*.

b. The trial court made very unfair and prejudicial evidentiary decisions implicating Runyan without foundation and preventing Runyan from raising a defense.

The trial court made evidentiary decisions so unfair and prejudicial in themselves that they violated Runyan's right to a fundamentally fair trial. In the course of making these decisions, the trial court projected to the jury erroneously and inappropriately that Runyan had confessed to looking at child pornography on the desktop computer seized by the Government from his ranch, and that Runyan had objected specifically to the Government's search of that computer; and the court prevented Runyan, in turn,

from supporting his defense theory that Misty Metcalf or someone else downloaded child pornography onto that computer, the CDs, and backup tapes at Runyan's ranch, by preventing trial counsel and the jury from getting access to the evidence of child pornography on Metcalf's and her boyfriend's computer until trial was over.

The trial court allowed, over objection, an unfounded conclusion by the Government that Runyan had confessed to going to child pornography websites on the desktop computer taken from his ranch, assisting the Government to meet its burden of proof for Count Four (receipt of child pornography) and Count Five (possession of child pornography). 10R540-41. The Government asked Nuckles, "While it could have reflected downloads from just about any period of time, what person has given an oral recorded statement saying he was using that computer to visit child pornographic newsgroups?" The trial court overruled counsel's objection that there had been no evidence or testimony saying any particular person had used the desktop computer. The Government refined its question: "I am talking about what individual has given a sworn oral statement that is in evidence in this case saying they visited child pornographic newsgroups and ***used that computer to do it.*** (emphasis added) I am talking about the defendant in his statement." Nuckles affirmed, "The defendant did tell . . . Ranger Grubbs that, in his statement." The trial court again overruled objection. *Id.*

Although Runyan spoke to Ranger Grubbs about going to sites on *some* computer, he did not say he visited any pornographic sites on the desktop computer nor clearly state that he *viewed any pictures* on the internet that constituted child pornography. 1R95-96. Runyan referred to "teen" sites (not necessarily child pornography) and said nothing about having seen or downloaded any pictures. Also, in his discussion with Grubbs, Runyan only referred to materials taken from the barn, not the computer from the ranch house. 1R96-97. Grubbs did not determine that the desktop computer *belonged to Runyan*

until late in the interview, well after the discussion of pornography websites. 1R101. Thus, the implication that Runyan confessed to having ever looked at pictures on the internet constituting child pornography is false, as well as the assertion that Runyan confessed to having done this on the desktop computer. Yet, the court allowed it in.

Also over vigorous objection, the trial court allowed the Government to elicit testimony from Nuckles that Runyan allowed the Government to search other areas, but not the desktop computer. On direct appeal, the Fifth Circuit held that this error by the trial court – allowing the Government to use a defendant's refusal to consent to a warrantless search to support an inference of guilt – violated the constitution. *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002). The Fifth Circuit found the error harmless, failing to consider its effect in the trial's context – where the trial court also had just allowed the Government to create the erroneous inference that Runyan confessed to using the same computer to look at child pornography websites.

The trial court went so far as to refuse three times (twice at trial; once on motion for new trial) to review *in camera* the material on Metcalf's and Wood's hard drive, which was in possession of the Government at trial and which Runyan asserted should contain exculpatory evidence impeaching Metcalf's testimony. The court also aggressively used trial counsel's lack of access to the hard drive to Runyan's disadvantage. 10R539 (court undercutting trial counsel's cross-examination of Nuckles about why he and Wargo had not examined the entire disk containing Wood's hard drive in three weeks, after the defense had relinquished the computer to Nuckles upon belief that certain files contained child pornography); 11R791-96 (court allowing cross-examination of Green on Wood's hard drive, over objection that the expert had been prevented from looking at the hard drive; court lecturing the defense about its access to the hard drive, when

defense access had been curtailed by law and the Government's actions); 11R832-37 (court asserting that questions of Government restriction on the defense's ability to view the hard drive do not "resolve any issue in this case"). On motion for new trial, the trial court treated the issue as the receipt of a modicum amount of new material (the expert's opinions about what was on Metcalf's and Wood's hard drive) rather than suppression of multiple actual images of child pornography, including especially images labeled by Metcalf and distributed by her on the internet under the guise that they were images of herself.

c. The trial court directed insulting and threatening comments toward trial counsel based on apparent suspicion of counsel's motives.

On numerous occasions, the trial court interrupted trial counsel, often commenting that counsel's questions were not helping to resolve any of the case's issues. R1: 42; R2: 138, 139, 143, 189, 204, 446, 499-503, 715-26. At one point, in front of the jury, the court suggested, without foundation, that trial counsel was making misrepresentations. R2: 355ff. Then the court terminated the testimony for the day abruptly in the middle of her testimony and delivered the following chilling comment outside the jury's presence:

> The Court: . . . [I]f I determine that Mr. Johnson was making misrepresentations . . . then Mr. Johnson and I are going to have . . . a conference concerning whether or not he will be held in contempt. He is an officer of this Court, and if he is making misrepresentations concerning documents or reports, then I consider that to be a very serious matter. So I am putting Mr. Johnson on notice that he is in jeopardy concerning this matter.

R2: 359. The record suggests that the court projected on counsel suspicion of a lack of candor that the court

undoubtedly harbored for the defendant because of Mr. Holder's clandestine action.

Despite all of the above evidence in support of actual judicial bias, without holding an evidentiary hearing, the trial court denied the Motion on March 3, 2005. Runyan moved for reconsideration under Rule 59(e), Federal Rules of Civil Procedure, asserting that it had been expected that the trial court would have recused itself under the mandatory provisions of Sections 144 and 455(a) of the Judicial Code. Runyan also noted that, even in denying his 2255 Motion, the trial court did not deny that it harbored (at trial and in post-conviction) a personal bias or prejudice against Runyan, only reinforcing Runyan's first claim. Runyan also deemed that the trial court admitted that it never informed Runyan's trial counsel, J.W. Johnson, that Holder betrayed client confidences to the trial court and told the court that Runyan planned to commit perjury. Runyan asserted that the presence of ongoing actual bias was apparent in the following: (a) the trial court's lack of denial of actual bias; (b) the trial court's failure to timely insure Mr. Johnson and Runyan knew the contents of the *in camera* discussion with Mr. Holder; (c) the trial court's failure to recuse itself at trial; (d) the trial court's failure to recuse itself in the Section 2255 proceedings; (e) the trial court's mischaracterization of Runyan's first claim in his Section 2255 Motion as a procedurally defaulted non-constitutional appearance of propriety issue that did not rise to a miscarriage of justice, when the issue was constitutional: an actually biased tribunal;[3] (f) the trial court's premature resolution of the factual issues in the Section 2255 Motion without issuing

[3] This was egregious because there was uncontroverted evidence that Mr. Johnson was unaware of the condition leading to the court's bias (Mr. Holder's closed colloquy) until trial was over as well as the time for filing a Motion for New Trial under Rule 33(b)(2), Fed. Rules Crim. Proc. (seven days following the verdict).

any preliminary orders in the case;[4] (g) the trial court's premature resolution of the factual issues in the Section 2255 Motion without directing under Rule 7(a) of the Rules Governing Section 2255 Proceedings that Runyan should expand the record with affidavits the court subsequently found lacking; (h) the trial court's premature resolution of the factual issues in the Section 2255 Motion without holding an evidentiary hearing which usually is required when the Motion "states a claim based on matters outside the record or events outside the courtroom." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); (i) the trial court's reliance on inappropriate authority to resolve the ineffective assistance claim involving Mr. Holder;[5] (j) the trial court's fact findings ignored the demonstrated actual bias at trial.

Asserting that the trial court had abused its discretion by not recusing itself sua sponte, Runyan moved that reconsideration be granted and that the court should rescind its decision denying relief and recuse itself from the case. On March 16, 2005, the trial court denied the motion for reconsideration. Runyan appealed.

5. Certificate of Appealability.

The trial court denied Certificate of Appealability on all points on April 27, 2005. Runyan thereafter sought Certificate of Appealability from the Fifth Circuit Court of

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[4] Although the trial court never issued an order to show cause [as far as Runyan knows] directing the Government to answer, the Government sua sponte answered, and Runyan replied.

[5] The court relied upon *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993), in order to suggest that a finding of prejudice under *Strickland* would give Runyan a windfall he did not deserve. The court, thus, obviously continued to believe Mr. Holder's unproven assertion that Runyan intended to take the stand and commit perjury, although Runyan did not take the stand at all.

Appeals. Runyan sought review of six issues: (1) whether the trial court abused its discretion by failing to recuse itself from adjudicating his Section 2255 Motion; (2) whether the trial court abused its discretion by denying his Rule 59(e) Motion; (3) whether the trial court abused its discretion by denying an evidentiary hearing to resolve the controverted, material facts related to the judicial bias and ineffective assistance claims; (4) whether the trial court was actually biased against Runyan in violation of due process; (5) whether Mr. Holder's *in camera*, ex parte communication with the trial court denied Runyan effective assistance of trial counsel; and (6) whether Mr. Johnson's failure to diligently and timely pursue a very favorable plea agreement denied Runyan effective assistance of trial counsel.

On June 12, 2006, in a two-page, cursory order, Judge Thomas Reavley, a member of the Fifth Circuit panel assigned to Runyan's case, denied COA. **Appendix A** (Order, June 12, 2006). Judge Reavley described the COA standard as follows:

> To obtain a COA, Runyan must make "a substantial showing of the denial of a constitutional right." § 2253 (c)(2). For claims denied on procedural grounds, this requires Runyan to show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." For claims denied on their merits, Runyan must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Order, June 12, 2006, at 1-2. Judge Reavley then listed Runyan's six issues (above) and summarily rejected them, stating in full: "A review of this record reflects no evidence of bias or impropriety of the district judge, no evidence of

ineffectiveness of counsel, and no error in denying an evidentiary hearing. Runyan has failed to make the showing required to obtain a COA. *See Slack*, 529 U.S. at 484. Accordingly, Runyan's COA motion is denied." *Id.* at 2.

Runyan filed a motion for panel rehearing arguing that Judge Reavley's order denying COA fell short of "paying lipservice to the principles" defined by this Court for "guiding issuance of a COA." The motion was denied on August 1, 2006. **Appendix B.**

Runyan now seeks certiorari from the Fifth Circuit decisions denying COA on his Section 2255 Motion and denying panel rehearing.

ARGUMENT/REASONS FOR GRANTING PETITION

1. The Fifth Circuit Court of Appeals' decision directly conflicts with this Court's rule, stated in *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), that lower courts may not deny Certificate of Appealability by "first deciding the merits of [the] appeal, and then justifying ... denial of COA based on ... adjudication of the actual merits ... in essence deciding an appeal without jurisdiction."

Judge Reavley's order denying COA is so inadequate that it falls short of even "paying lipservice to the principles" defined by this Court for "guiding issuance of a COA." *Tennard v. Cockrell*, 542 U.S. 274, 283 (2004). The Order indulges in exactly what this Court warned against in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). It "sidesteps" a proper process of COA determination "by first deciding the merits of [the] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits ... in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37.

The Order peremptorily reviews the merits by (1) defining what is required for COA in an overly restrictive

way and (2) concluding astoundingly and without explanation that there is "no evidence" in support of the issues. The "no evidence" finding appears designed to merely end all chance of review rather than to determine what a "reasonable jurist" might conclude about the evidence. Put another way, no reasonable jurist should have found that there is "no evidence" of judicial bias in support of Runyan's issues; and thus, the way in which Judge Reavley conducted his COA analysis cannot comport with this Court's requirements as elucidated in *Miller-El*. It means that he must have inappropriately prejudged the merits.

This Court repeatedly has defined the proper standard for Certificate of Appealability as follows:

> The "controlling standard" for COA determination of a constitutional claim is:
>
> [The] petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"

Miller-El, 537 U.S. at 336; *Slack*, 529 U.S. at 484 (both quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Judge Reavley's Order utilized a shorthand version of the *Barefoot* standard that, when used in isolation, omits everything following the conjunction "or" in the full *Barefoot* standard, unfairly limiting a case like Runyan's in which discovery or an evidentiary hearing should be granted for development of well-founded allegations of constitutional error. In a case in which expansion of the record should have been granted for full development of the issues, and was not, the question whether the petition should have been resolved in a different manner cannot be fairly asked or answered because the defendant's right to full development of the facts was not afforded.

Judge Reavley also quotes the *Slack* standard for granting COA on procedural grounds, which could relate

to the district court's denial of an evidentiary hearing or to the court's treatment of Runyan's constitutional claim of "actual bias," which the district court transformed into what it asserted was a procedurally defaulted statutory claim. However, Judge Reavley clearly enters a simple merits ruling of "no evidence" existing to support the claim of actual bias (and, therefore, to support ineffective assistance) in order to dispose of the COA application. In the face of allegations and record facts as developed as Runyan's, this is precisely the exercise in merits decision-making this Court rejected in *Miller-El*.

a. The Fifth Circuit made factual findings to deny COA that were blatantly unreasonable.

Judge Reavley rendered a merits decision without jurisdiction, finding that there was absolutely "no evidence" to support any of Runyan's allegations. This boldly rejects record facts which, without more, support an inference of actual bias on the part of the trial judge, who was subjected (unbeknownst to Runyan or his counsel) to an enormously biasing influence immediately prior to Runyan's trial. Furthermore, the declaration of "no evidence" artfully slides around the district court's erroneous procedural disposition of the "actual bias" issue and the issue whether the district court abused its discretion by failing to recuse itself *sua sponte* from adjudicating Runyan's Section 2255 Motion.

The Fifth Circuit, at the very least, should have granted COA on the district court's procedural treatment of the "actual bias" claim (and its ramifications for the ineffective assistance claim as to Holder). The district court's finding of procedural default against trial and direct appeal counsel for not raising the "actual bias" issue earlier is baseless, easily within the realm of the "debatable" as a procedural ruling. No evidence controverts that trial and appeal counsel (Johnson) did not learn of the substance of Mr. Holder's comments in the ex parte, *in*

camera colloquy until after the time that the Federal Rules allowed expansion of the record on appeal. While Johnson learned on April 17, 2000, that Holder had been to the trial court's office and had been allowed not to participate in the trial, Johnson did not learn what Holder told the judge until on or about March 15, 2001, when he received a copy of the ex parte, in chambers colloquy. This was after Johnson had mailed his appeal brief (in which he could not have expanded the record), beyond the period for filing a relevant motion for new trial in which he could have expanded the record (under Rule 33(b)(2), Federal Rules of Criminal Procedure; 7 days following verdict), and it pertained to an issue not relevant to the only other means available to expand the record besides a Section 2255 Motion, Rule 33(b)(1), Federal Rules of Criminal Procedure (for raising issues of actual innocence).[6]

b. Conclusion.

Judge Reavley's Order directly conflicts with *Miller-El*, because it truncates the COA standard, and the *evidence* presented in support of the specific allegations is clearly sufficient to convince a reasonable jurist (1) "that the issues presented [are] 'adequate to deserve encouragement to proceed further'" and (2) that it is debatable that the district court was correct in its procedural rulings. The "no evidence" finding by the Fifth Circuit is a pretext to deny relief, a premature use of the merits, and an insincere look at the merits. The Court had no jurisdiction to make the finding.

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[6] The newly discovered evidence that is raised in a Rule 33(b)(1) motion must be that which "will probably produce an acquittal." *United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991). Evidence that goes to structural error (actual bias of a trial judge) or only to the prejudice formulation under *Strickland* is not relevant to a Rule 33(b)(1) motion, although perfectly suited for a Section 2255 Motion.

Runyan proved what was needed for COA. Procedurally, the record clearly shows there was no default by trial or appeal counsel in raising the issue of the trial court's bias. On the merits, too, the record provides serious evidence of trial court bias. Runyan's claims that the trial court was actually biased and that trial counsel (Holder) was ineffective for causing that bias are well grounded, bearing no speculation. They are made in good faith and are proven way beyond any "absence of frivolity" that could be conceived as a very minimum ground for COA. *Miller-El*, 537 U.S. at 338. The issues certainly were adequate for encouragement to proceed further.

2. The Fifth Circuit Court of Appeals' decision directly conflicts with this Court's rule, stated in *Harris v. Nelson*, 394 U.S. 286, 291 (1969), requiring that Section 2255 Movants be given a fair opportunity to develop evidence in support of their petition.

This Court has affirmed that "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Judge Reavley's Order conflicts with that duty of care by preventing Runyan from having a fair opportunity to "develop[] the evidence needed to support in necessary detail the facts alleged in his petition" and creating for him, instead, a "procedural morass." *Id.* Runyan has made very specific allegations, based upon clear record evidence, that deserve further development:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, ***it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.***

Harris, 394 U.S. at 300 (emphasis added). In addition to conflicting with *Miller-El*, Judge Reavley's Order directly conflicts with *Harris*. Judge Reavley's standard for COA is unfairly and erroneously truncated, preventing a proper finding that the issues deserve encouragement to proceed further. An evidentiary hearing is usually required for further proceeding when the Section 2255 Motion "states a claim based on matters outside the record or events outside the courtroom." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). "The district court may deny a Section 2255 Motion without an evidentiary hearing only if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *Id.*

It is disingenuous to find that "no evidence" supports issues raised, when a mandatory rule of this Court would have required the trial court to allow development that could have led to relief, and the very thing of which the petitioner has complained is that the trial court unfairly blocked that development. Runyan "set forth specific allegations of fact" in support of each of his claims. *United States v. Edwards*, 442 F.3d 258, 268 n.10 (5th Cir. 2006). There was nothing speculative nor inconcrete about what he alleged. *Id.* It is impossible to say that Mr. Holder's comments to the trial judge were not the sort that would bias a reasonable judge. It is unreasonable to ignore the trial court's own suppression of the *in camera* colloquy as evidence of bias. There is no speculation about what was said in the colloquy; there is no speculation as to the additional record facts supporting a finding that the trial court crossed the forbidden line into advocacy, because of what it heard in the colloquy.[7]

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[7] In *Edwards*, the Fifth Circuit rejected a *Giglio* claim that the Government and a judge had colluded during an *in camera* colloquy to suppress a secret deal with a cooperating witness. The Fifth Circuit

(Continued on following page)

CONCLUSION

Runyan demonstrated a due process violation by "establish[ing] that a genuine question exists concerning [the trial court's] impartiality." *Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005) (citing *Liteky*, 510 U.S. at 552). Runyan alleged "bias sufficient to reverse."[8] It was an

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based its decision on the significant, contrary evidence in the record that supported the non-existence of a deal, and on the paucity of evidence that the petitioner raised of its existence: "Appellants offer no support for this serious allegation other than pointing to a short, off-the-record chambers conference between the judge and the attorneys that happened during [the witness'] arraignment and speculating that something illicit occurred during the recess." *Edwards*, 442 F.3d at 266. Runyan's case directly conflicts with *Edwards*. Runyan has fully presented the contents of his colloquy and they clearly prove that "something illicit" occurred – unethical betrayal of confidence and extremely harmful conveyance of speculation about the defendant's thought processes and intentions to the Court prior to trial. The subsequent record – the Court's decisions not to recuse itself (at any point in the course of the case) and not to inform remaining trial counsel or Runyan of the contents of the colloquy, the Court's abusive treatment of remaining trial counsel, the Court's unfounded, open expression of doubt in remaining trial counsel's candor before the Court, and the Court's highly prejudicial, erroneous procedural decisions (at trial and after) – is clear evidence of bias. On the other hand, also unlike *Edwards* – wherein, for example, testimony was given by two attorneys who denied the charge of colluding in a secret deal – there is *no evidence* that the judge was not unfairly biased by Holder's clandestine colloquy. To deny a hearing for further development of the claims under such circumstances is fundamentally unfair.

[8] *Mitchell v. Sirica*, 502 F.2d 375, 380 (1974) (MacKinnon, J., dissenting). Such bias was described in a Sixth Circuit case as follows: "Whether unconsciously or otherwise, (the trial judge) failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and fully justifies appellants' complaint that at times 'he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff.'" *Knapp v. Kinsey*, 232 F.2d 458, 467 (6th Cir. 1956).

abuse of discretion for the district court to deny Runyan an evidentiary hearing that would allow him to develop all of the claims related to the court's bias. *United States v. Auten*, 632 F.2d 478, 482 (5th Cir. 1980). It was an abuse of the COA process for the Fifth Circuit to issue a premature merits ruling in order to avoid granting COA on procedural and substantive grounds and, probably, to avoid having to remand the case to the district court level for an evidentiary hearing before a different judge.

PRAYER FOR RELIEF

PREMISES CONSIDERED, Petitioner Runyan respectfully prays that this Court grant this petition for certiorari, vacate the Fifth Circuit's denial of COA, and remand his case to the Fifth Circuit for a proper consideration of his application for COA.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10458

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERT BEAM RUNYAN

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas, San Angelo

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(Filed Aug. 1, 2006)

Before JOLLY and OWEN, Circuit Judges.*

PER CURIAM:

A member of this panel previously denied motion for certificate of appealability. The panel has considered Appellant's motion for a panel rehearing as a motion for reconsideration. IT IS ORDERED that the motion is DENIED.

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* Judge Reavley was a member of the original panel, but did not participate in this decision.

* This order is being entered by a quorum of this court pursuant to 28 U.S.C. Sect. 46(d).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10458
USDC No. 6:04-CV-37
USDC No. 6:99-CR-47

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT BEAM RUNYAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Jun. 12, 2006)

ORDER:

Robert Beam Runyan, federal prisoner # 33401-077, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion. Runyan filed the § 2255 motion to challenge his convictions for sexual exploitation of children and for receipt and possession of child pornography.

To obtain a COA, Runyan must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). For claims denied on procedural grounds, this requires Runyan to show "that jurists of reason would find it debatable whether the petition states a valid claim of the

denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." For claims denied on their merits, Runyan must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Runyan argues that: (1) the district court was actually biased against him at trial; (2) the district court abused its discretion by failing to recuse itself from Runyan's § 2255 motion; (3) the district court abused its discretion by failing to recuse itself from his Fed. R. Civ. P. 59(e) motion; (4) his counsel, Floyd Holder, rendered ineffective assistance by disclosing to the district court that Runyan intended to testify falsely; (5) his counsel, J.W. Johnson, rendered ineffective assistance by failing to pursue a plea agreement; and, (6) the district court erred in denying his § 2255 motion without conducting an evidentiary hearing.

A review of this record reflects no evidence of bias or impropriety of the district judge, no evidence of ineffectiveness of counsel, and no error in denying an evidentiary hearing.

Runyan has failed to make the showing required to obtain a COA. *See Slack,* 529 U.S. at 484. Accordingly, Runyan's COA motion is DENIED.

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ROBERT BEAM RUNYAN,	)	
	)	
Movant,	)	CIVIL ACTION NO.
V.	)	6:04-CV-037-C
UNITED STATES OF AMERICA,	)	(6:99-CR-047-C)
	)	
Respondent.	)	

ORDER

(Filed Mar. 3, 2005)

Movant, Robert Beam Runyan ("Runyan"), filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, together with supporting exhibits. The Government filed a response, together with relevant records, and Runyan filed a reply.

BACKGROUND

Runyan was charged in a superseding indictment on October 13, 1999, with two counts of sexual exploitation of children, in violation of 18 U.S.C. § 2251 (Counts 1 and 2); one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) (Count 3); one count of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) (Count 4); one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(5)(B); and one count of forfeiture, in violation of 18 U.S.C. § 982 (Count 6). Counts 2 and 6 were dismissed on April 14, 2000.

A jury trial commenced on April 17, 2000, and Runyan was convicted on April 21, 2000, on Counts 1, 3, 4, and 5. On July 28, 2000, Runyan was sentenced to a term of 240 months' imprisonment on Count 1; 60 months' imprisonment on Count 3, to run consecutive to Count 1; and 180 months' imprisonment on each of Counts 4 and 5, to run concurrently to each other and with Count 1. Runyan's total aggregate sentence was 300 months' imprisonment with a three-year term of supervised release.

Runyan filed a notice of appeal on July 31, 2000, "contending that: (1) the trial court erred in failing to suppress the evidence obtained directly and indirectly from the pre-warrant police searches; (2) there was insufficient evidence introduced at trial to support the interstate commerce element of each of the four charges; (3) the trial court erred in refusing to order the government to produce [a] computer and in refusing to conduct an *in camera* review of evidence on [a] computer that Runyan contends was exculpatory; (4) the trial court erred in admitting evidence that Runyan refused to consent to the search of the desktop computer; and (5) the trial court erred in not grouping all the counts of his conviction in the sentencing determination." *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001).

While Runyan's appeal was still pending before the United States Court of Appeals for the Fifth Circuit, Runyan filed a Motion for New Trial on August 20, 2001, alleging newly discovered evidence. Runyan asked the appellate court to abate his pending appeal for a limited remand to the District Court for a hearing on his motion for new trial. The Fifth Circuit heard oral arguments on September 4, 2001, and the Government filed its response to the motion for new trial on September 7, 2001. The

District Court denied the motion for new trial on September 7, 2001. Runyan filed a notice of appeal on September 14, 2001, appealing the denial of his motion for new trial. Runyan's pending appeals were consolidated for hearing by the Fifth Circuit, and on December 10, 2001, the Fifth Circuit ordered a limited remand to the District Court for a hearing to resolve one of Runyan's Fourth Amendment claims. *See United States v. Runyan*, 275 F.3d 449. After conducting an evidentiary hearing, the District Court entered findings of fact and the case was returned to the Fifth Circuit.

On April 18, 2002, the Fifth Circuit affirmed the District Court's denial of Runyan's motion for new trial; affirmed Runyan's convictions on Counts 1, 4, and 5; reversed the conviction as to Count 3; and vacated Runyan's sentence. *See United States v. Runyan*, 290 F.3d 223 (5th Cir. 2002). The case was remanded to the District Court for re-sentencing on Counts 1, 4, and 5. Mandate issued on May 28, 2002.

Runyan filed a petition for writ of certiorari on August 12, 2002, which was denied by the United States Supreme Court on October 7, 2002.

On August 30, 2002, Runyan was re-sentenced to 240 months' imprisonment on Count 1 and 180 months' imprisonment on each of Counts 4 and 5, to run concurrently with each other and with Count 1. Runyan's total aggregate sentence was 240 months' imprisonment, to be followed by a three-year term of supervised release.

Runyan filed a notice of appeal on September 3, 2002, appealing his sentence following remand. In this appeal, Runyan argued that "(1) if § 2G2.2 was applied based on his conviction for receipt of child pornography, it was error,

because § 2G2.*4*, not § 2G2.*2*, should apply to receipt of child pornography convictions; (2) sentence of 180 months' imprisonment for possession of child pornography (Count 5) was above the statutory maximum of five years; and (3) the enhancement of his offense level under § 2G2.2(b)(2) and (5) for distributing child pornography and use of a computer, was error." *United States v. Runyan*, No. 02-10995 (5th Cir., Mar. 7, 2003). On March 7, 2003, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed at re-sentencing.[1] Mandate issued on March 31, 2003. Runyan did not file a petition for writ of certiorari to the United States Supreme Court.

On June 4, 2004, Runyan filed his § 2255 motion challenging his conviction and sentence.

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255, there are four grounds upon which Runyan may move to have his federal sentence vacated, corrected, or set aside:

(1) the sentence was imposed in violation of the Constitution or laws of the United States;

(2) the court was without jurisdiction to impose the sentence;

(3) the sentence exceeds the statutory maximum sentence; or

(4) the sentence is otherwise subject to collateral attack.

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[1] Although discussing the merits of all three issues, the Fifth Circuit also found that Runyan had waived issues (2) and (3) because he could have raised those issues in his first appeal but did not.

28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555 (5th Cir. 1996). Relief under § 2255 is thus reserved "for transgressions of constitutional rights and for a narrow range of [non-constitutional] injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Non-constitutional issues are cognizable under § 2255 only if the error could not have been raised on direct appeal. *United States v. Shaid*, 937 F.2d 228, 232 n. 7 (5th Cir. 1991) (*en banc*).

ISSUES

In his § 2255 motion, Runyan raises three claims for relief –

(1) he was tried by a judge harboring actual bias against him in violation of the due process clause of the Fifth Amendment to the Constitution of the United States (Judicial Bias and Prejudice);

(2) he was denied his right to effective assistance of trial counsel (Floyd Holder), as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, by trial counsel's *in camera*, *ex parte* communication with the court, causing the court to be biased against him (Ineffective Assistance of Counsel); and

(3) he was denied his right to effective assistance of trial counsel (J. W. Johnson), as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, by trial counsel's failure to diligently and timely pursue a very favorable plea

agreement (Ineffective Assistance of Counsel).

JUDICIAL BIAS AND PREJUDICE

Runyan alleges that the Court was biased against him, resulting in a denial of due process. He alleges that the Court (1) interrupted Runyan's counsel numerous times "with *sua sponte* instructions to move the case along," (2) admonished counsel that he "was pursuing matters that pertained to no issues in the case," (3) made "degrading and threatening remarks" towards Runyan's counsel "(openly suggesting that counsel was trying to defraud the Court and jury),"[2] and (4) made "unfair and prejudicial evidentiary rulings." Runyan also complains about the Court overruling objections, ordering counsel about and telling him to move on and change subjects, admitting prejudicial evidence, allowing the Government to assert that Runyan refused to consent to search of a computer, and assisting the Government in keeping trial counsel from having access to exculpatory evidence.

Runyan argues that the basis for the Court's bias and prejudice was an *in camera* meeting just prior to trial, held *ex parte*, between the Court and Floyd Holder, one of Runyan's attorneys, wherein Holder asserted that "Runyan intended to commit fraud upon this Court and the jury."

At 8:15 a.m. on April 17, 2000, the morning of trial, one of Runyan's attorneys, Floyd Holder, appeared before

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[2] Admonishments and comments to counsel were made outside the presence of the jury.

the Court in chambers, *ex parte* and *in camera*. Mr. Holder told the Court:

> I was employed by Mr. Runyan last fall after he had employed Mr. Robert Smith, and Mr. Smith and Mr. Meacham had reached an agreement for a plea related to count four of the indictment. I reviewed the facts with Mr. Runyan. Mr. Meacham had a deadline for notifying him if the plea was acceptable. I notified him the plea was acceptable to count four. Count four involves receiving child pornography.
>
> Upon receipt of the plea papers, however, there were some stipulations about aggravating circumstances that we could not agree to.
>
> Subsequently, I notified the Court Administrator that we wanted to interchange our plea and have a new arraignment and plead to counts four and five of the indictment as guilty and plead not guilty to counts one, two, and three. Before that could be scheduled, the indictment was reindicted to add count six, which is a forfeiture count.
>
> At about this time Mr. Runyan hired J. W. Johnson to represent him. Since the date Mr. Johnson was employed, which was almost immediately after the forfeiture count was entered, I have had no contact with the client. I have been helping Mr. Johnson with federal rules and procedural questions and questions of law.
>
> The plea that was arrived at and scheduled to be given last Tuesday was not acceptable to the Court, and we began to get ready for trial. I became concerned about the shape that the evidence appeared to be taking, and expressed those concerns to Mr. Johnson stating that they were

inconsistent with the facts that I believed to be. I did advise Mr. Johnson that if Mr. Runyan took the witness stand and related facts consistent with what I perceived the defense to be shaping up to be, that I would have an affirmative duty to advise the Court that a fraud was being committed on the Court, and my services had been used to fabricate this fraud, and urged with the utmost suasion that he urge Mr. Runyan not to testify, because should he do so, I would have no question or no option but to notify the Court.

I was advised Saturday afternoon that I was mistaken as to the facts, and that Mr. Runyan did intend to testify. I advised Mr. Johnson I would have no option but to ask the Court to let me withdraw, and urged him once again not to let Mr. Runyan testify, and that if he did I would have no option but to come to the Court and explain exactly what the facts were that I thought to be, and I would ask the Court at this time to permit me to be excused. And should the defense, despite my exhortations, decide to put Mr. Runyan on, I would come down and relate to the Court or to – I would just simply try to put things right.

The Court permitted Holder to withdraw.

At 9:00 a.m. on April 17, 2000, the Court held a hearing on Runyan's motion to suppress evidence. Runyan appeared with his attorney, J. W. Johnson, along with the Government's attorneys. Thereafter, voir dire began at 1:30 p.m. and the jury was seated and advised to report back at 8:30 a.m. the following morning for trial. Trial began on April 18 and continued through April 21. The jury returned a verdict of guilty on Counts 1, 3, 4 and 5.

Attorney Holder did not appear in Court for any of the proceedings. Runyan did not testify.

Runyan alleges that

> **Mr. Johnson has related to undersigned counsel that he was unaware** that Mr. Holder intended to communicate with this Court *ex parte* and *in chambers* (sic), let alone the potential substance of that communications. While Mr. Johnson learned on April 17, 2000, that Mr. Holder had been in this Court's offices and had been allowed to not to participate in the trial, Mr. Johnson did not learn of the substance of Mr. Holder's comments to this Court until on or about March 15, 2001, when a copy of the *ex parte, in chambers* colloquy was obtained, as reflected by the "fax header" . . . .

[emphasis added].[3]

Runyan did not raise his claim of judicial bias and prejudice on appeal. His appeal was pending on March 15, 2001, the date Runyan claims Johnson learned the substance of Holder's comments to the Court on April 17, 2000. His appellate brief was filed the next day on March 16, 2001. According to the Fifth Circuit's docket sheet, Runyan did not seek permission to supplement or amend his appellate brief. The Fifth Circuit rendered its opinion

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[3] In his reply to the Government's response, Runyan again mentions "Mr. Johnson's assertions, as related to undersigned counsel." It is noted that Runyan has not submitted a sworn affidavit from Mr. Johnson as to his knowledge surrounding Holder's communications with the Court and there is no evidence before this Court as to Johnson's knowledge as to the substance of Holder's comments, nor is there any evidence to contradict Holder's comments to the Court during the *in camera* meeting as to what he had told Johnson.

on Runyan's first appeal on April 18, 2002. Further, Runyan did not raise this issue in his motion for new trial, which was filed while his first appeal was pending. Further, Runyan did not claim judicial bias and prejudice before his re-sentencing on August 30, 2002, which occurred approximately 18 months after he allegedly learned the substance of the comments giving rise to his claims of judicial bias and prejudice. Further, he did not raise this issue on his second appeal.[4]

Although the Fifth Circuit affirmed Runyan's resentencing on March 3, 2003, and mandate issued on March 31, 2003, Runyan did not file his § 2255 motion until June 4, 2004.[5]

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988), the Supreme Court ruled that a collateral attack regarding the appearance of impropriety was warranted "unless it can be said that [the party claiming disqualification] did not make a timely request for relief." Although *Liljeberg* was a civil case, the timeliness of the challenge has been noted in the criminal context. *See United States v. Rogers*, 119 F.3d 1377, 1382 (9th Cir. 1997); *United States v. Cerceda*, 172 F.3d 806, 813 (11th Cir. 1999) (noting, but not considering, the timeliness of the motions because the Government failed to raise timeliness as an issue).

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[4] In his second appeal, the appellate court noted that Runyan has raised two issues which were rejected because they had not been raised in his first appeal.

[5] Runyan did not file a petition for writ of certiorari after his second appeal, so his conviction and sentence became final on June 30, 2003, 90 days after mandate was issued by the Fifth Circuit.

> The teaching we derive from *Liljeberg* is that appearance of impropriety may be raised on collateral attack only if asserted promptly upon learning the facts alleged to warrant recusal and may not be raised collaterally if the opportunity to do so existed at a time when direct review was available. It is especially appropriate to apply that rule to an attempted collateral attack on a criminal judgment because of the usual rule that in criminal cases, a collateral attack may not do service for an appeal. Absent exceptional circumstances, a non-constitutional and non-jurisdictional claim may not be raised collaterally under section 2255 where it could have been, but was not, raised on direct appeal.

Hardy v. United States, 878 F.2d 94, 97 (2d Cir. 1989) (internal quotations and citations omitted).

Runyan's judicial bias and prejudice claim alleging the appearance of impropriety is untimely.

Alternatively, Runyan has failed to show an appearance of impropriety.

"Most matters relating to judicial disqualification [do] not rise to a constitutional level." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). The issue before the Court is "whether there was an appearance of impropriety which rose to the level of a 'fundamental defect' resulting in 'a complete miscarriage of justice.'" *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990). "Absent that level of severity, the claim of an appearance of impropriety is not cognizable under 28 U.S.C. § 2255." *Id.*

The Supreme Court in *Liteky v. United States*, 510 U.S. 540, 555-56 (1994), found:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

[emphasis in original] [internal citations omitted].

"'[E]xpressions [by the Court] of impatience, dissatisfaction, annoyance and even anger' do not establish bias or partiality." *Andrade v. Chojnacki*, 338 F.3d 448, 462 (5th Cir. 2003) (quoting *Liteky v. United States*, 510 U.S. 540, 555-56 (1994)). *See United States v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997) (affirming denial of motion to recuse where the court allowed "the Government more leeway during its questioning and did interrupt defense counsel's questioning more often than the Government's questioning"); *Garcia v. Woman's Hosp. of Texas*, 143 F.3d 227, 230 (5th Cir. 1998) (affirming denial of motion to recuse where the court made unflattering comments about plaintiff's ability to prove her case); *United States v. Gray*, 105 F.3d 956, 964-65 (5th Cir. 1997) (court's active participation in and strict control of direct and cross-examination did not create appearance of impropriety; trial judges have wide latitude to impose reasonable limits on questioning; confrontation clause does not guarantee opportunity for cross-examination in whatever way or to whatever extent defendant wishes).

Alternatively, Runyan's claim is procedurally barred because he did not raise it in the trial court, on direct appeal of his conviction and sentence, or on direct appeal after re-sentencing. Runyan may not raise this issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice. *United States v. Shaid*, 937 F.3d 228, 232 (5th Cir. 1991); *United States v. Frady*, 456 U.S. 152, 168 (1982). Runyan allegedly learned of the comments made by Holder while his direct appeal was pending, and prior to the filing of his appellate brief. He did not raise the issue when the trial court was considering his motion for new trial, nor did he raise the issue prior to re-sentencing or on his appeal of

the re-sentence. Runyan has failed to show cause and prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court, in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), established a two-prong standard for ineffective-assistance-of-counsel claims. First, Runyan must demonstrate that his counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. To show that the performance was deficient, Runyan must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, Runyan must show that his counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Deficient performance will be found to be prejudicial only upon a showing that, but for counsel's errors, there is a reasonable probability that the final result would have been different and that confidence in the reliability of the verdict is undermined. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); *Armstead v. Scott*, 37 F.3d 202, 206-07 (5th Cir. 1994).

"An error of counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 694. Rather, it must be determined whether "there is a reasonable probability that counsel's error affected the outcome of the trial." *Id.* at 691. "A reasonable probability need not be proof by a preponderance that the result would have been different, but it must be a showing sufficient to undermine confidence in

the outcome." *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004).

A defendant must show "actual prejudice" as a result of his counsel's deficient performance. *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998). Runyan is required to show "that the attorney's errors were so deficient as to render the verdict fundamentally unfair or unreliable." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997). This "performance inquiry" is to be made applying a reasonableness standard; i.e., was counsel's assistance reasonable under all the circumstances, making the assessment, not in hindsight, but evaluating the conduct from counsel's perspective at the time of the conduct. Thus, the reviewing court is to be highly deferential in scrutinizing counsel's performance. *Strickland*, 466 U.S. at 688-89.

"The failure to prove either deficient performance or actual prejudice forecloses an ineffective assistance claim." *Green v. Johnson*, 160 F.3d 1029 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999). *See Goodwin v. Johnson*, 132 F.3d 162, 174 (5th Cir. 1997) (stating that the presence or absence of prejudice at either trial or appellate level hinges upon the fairness of the trial and the reliability of the verdict). It is not necessary, however, for a district court to address both requirements of the conjunctive *Strickland* standard when addressing an ineffective-assistance claim; such a claim may be disposed of solely on a petitioner's failure to meet either requirement. *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995).

A petitioner must affirmatively prove and not merely allege prejudice. *Mangum v. Hargett*, 67 F.3d 80, 84 (5th Cir. 1995); *Deville v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994). *See Armstead v. Scott*, 37 F.3d 202, 207 (5th Cir.

1994) (stating that the Fifth Circuit requires an appreciable showing of prejudice).

Prejudice will be presumed in a limited number of cases. These include: (1) "the complete denial of counsel," such as "if the accused is denied counsel at a critical stage of his trial;" (2) situations in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) "on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). "A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *Gochocoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000).

Where counsel provides "some meaningful assistance," the petitioner must prove prejudice. *Craker v. McCotter*, 805 F.2d 538, 543 (5th Cir. 1986).

Conclusory allegations unsupported by any specific facts do not merit a federal court's attention. *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990) ("mere conclusory allegations on a critical issue are insufficient to raise a constitutional claim"); *Kinnamon v. Scott*, 40 F.3d 731, 735 (5th Cir. 1994) (finding "speculation" of ineffective assistance to be no basis for habeas relief).

"[T]he presence or absence of prejudice, both with respect to claims of ineffective assistance of counsel at the

trial and appellate levels, hinges upon the fairness of the trial and the reliability of the judgment of conviction resulting therefrom." *Goodwin v. Johnson*, 132 F.3d at 174.

(1) Floyd Holder

Runyan argues that attorney Holder rendered ineffective assistance of counsel because he had an *ex parte*, *in camera*, meeting with the Court on April 17, 2000, the morning of trial, wherein Holder conveyed to the Court that it was his belief that Runyan intended to commit fraud upon the Court.[6] Runyan alleges that this revelation caused the Court to be "manifestly prejudiced" against him.

Runyan argues that "Holder breached his duties to protect attorney-client privilege and be a zealous advocate for his client by telling this Court his opinion about Runyan's possible testimony which was gleaned through the confidential process of communicating with his client and other trial counsel."

The Supreme Court has noted that there is an "important limitation on a defendant's right to assistance of counsel: Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony." *United States v. Grayson*, 438 U.S. 41, 54 (1978); *United States v. Litchfield*, 959 F.2d 1514, 1518 (10th Cir. 1992).

"Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the

[6] The transcript of the *in camera* colloquy is set forth hereinabove in the discussion of Runyan's judicial bias and prejudice claim.

Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166. "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." *Id.* at 173 [emphasis in original].

"For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully. . . . When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel." *Id.* at 174.

"The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and in judging prejudice and the likelihood of a different outcome, a defendant has no entitlement to the luck of a lawless decisionmaker." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993) [internal quotations and citations omitted]. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

"[T]he Supreme Court in *Nix v. Whiteside* re-affirmed the duty of counsel not to participate in perjury and also approved an explicit statement to the court of the fact that perjury is about to be committed." *United States v. Henkel*, 799 F.2d 369 (7th Cir. 1986) [internal citation omitted].

"[T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury." *Nix v. Whiteside*, 475 U.S. at 174. "In short, the duty of attorney-client privilege silence is relieved when such silence would result in false testimony being presented." *United States v. Henkel, supra.*

Runyan was represented by hired counsel at all times during his trial. Attorney Holder did not make an appearance during the trial and the jury was not aware of Holder's withdrawal prior to trial. Runyan did not testify. As the Court has previously found, Runyan has failed to show an appearance of impropriety, bias or prejudice on the part of this Court based upon Holder's *ex parte*, *in camera* meeting with the Court and Holder's withdrawal as counsel.

Runyan has failed to show that Holder's actions were deficient. Even if Holder's actions could be deemed to have been deficient, Runyan has failed to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Therefore, Runyan has failed to establish the prejudice prong of *Strickland*. *See Nix v. Whiteside*, 475 U.S. at 175.

(2) J. W. Johnson

Runyan alleges that he was denied effective assistance of counsel when his trial counsel J. W. Johnson failed to diligently and timely pursue a very favorable plea agreement. He claims that Johnson failed to pursue the

plea process that had been initiated and developed by attorney Holder prior to Johnson becoming lead counsel.

The Court has considered the sworn affidavit of attorney Johnson regarding the plea negotiation process.[7] According to Mr. Johnson, Runyan refused the plea agreement negotiated by Holder prior to Johnson being hired as lead counsel in November 1999. Thereafter, the Government was steadfast in its refusal to negotiate a different plea. On or about April 4, 2000, 13 days before the scheduled trial, the Government's attorney and Johnson negotiated a plea agreement wherein Runyan would plead guilty to Count 5 for possession of child pornography, with a range of punishment of 3-5 years to be determined by the Court, a $20,000 fine, and the dismissal of all other pending federal and state charges. Attorney Holder advised Johnson that the Court might not be willing to take a plea "at this late date." Then, on April 5, the District Attorney for Coleman County, Texas, advised that he did not approve the plea bargain and that he would not dismiss the state charges. However, the next day, on April 6, the Government's attorney advised Johnson that the state had agreed to dismiss all charges pending in Coleman County.[8] Johnson received an oral

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[7] Runyan has failed to provide any sworn evidence to rebut Johnson's affidavit or to support his claim of ineffective assistance of counsel.

[8] The following charges were pending in Coleman County, Texas: (1) Cause No. 1225 – sexual performance by a child; (2) Cause No. 1226 – sexual performance by a child; (3) Cause No. 1227 – sexual performance by a child; (4) Cause No. 1228 – sexual performance by a child; (5) Cause No. 1229 – sexual performance by a child; (6) Cause No. 1230 – possession/promotion of child pornography; (7) Cause No. 1231 – sale/distribution/display harmful materials; (8) Cause No. 1232 – aggravated sexual assault/sexual assault; (9) Cause No. 1233 –

(Continued on following page)

confirmation of that agreement from the state's attorney on Friday, April 7, 2000, and requested written confirmation. On Monday, April 10, Johnson received a letter from the Coleman County District Attorney agreeing to dismiss the state charges if Runyan agreed to plead guilty to Count 5 and the Government approved the plea bargain. The Government's attorney then prepared a written plea agreement and forwarded a copy to Johnson. Although the copy of the written plea agreement submitted by Runyan in support of his § 2255 motion indicates that it had been signed by the Government's attorneys, the plea agreement does not contain the signature of Runyan or Johnson. According to Johnson, on April 11 the Government's attorney informed him that the Court wanted to review the plea bargain agreement and Johnson called the Court's coordinator and related the terms and conditions of the plea bargain. The parties were later advised that the Court had rejected the plea agreement. Trial began on April 17, 2000, as previously scheduled.

"[T]here is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *United States v. Rankin*, 572 F.2d 503, 505 (5th Cir. 1978); *United States v. Lopez*, 979 F.2d 1024, 1036 (5th Cir. 1992) ("There is, however, no constitutional right to a plea bargain, and the prosecutor has the discretion either to bargain or to go to trial."). "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." 429 U.S. at 561. "[T]he successful

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indecency with a child; (10) Cause No. 1234 – aggravated assault; (11) Cause No. 1235 – aggravated assault; (12) Cause No. 1236 – obscenity; and (13) Cause No. 1237 – sale/distribution/display harmful materials.

negotiation of a plea agreement involves factors beyond the control of counsel, including the cooperation of his client, . . . as well as the cooperation of the prosecutor, who has no obligation to offer such an agreement." *United States v. Hall*, 212 F.3d 1016, 1022 (7th Cir. 2000).

Runyan has failed to show that attorney Johnson's performance was deficient.

To the extent that Runyan attempts to raise an issue in footnote 10 on page 63 of his § 2255 motion regarding the Court's rejection of a plea agreement, his claim would be procedurally barred because he did not raise the claim on direct appeal.

CONCLUSION

The Court has reviewed Runyan's § 2255 motion and exhibits, the Government's answer, together with relevant records, and Runyan's reply.

Based upon a review of the relevant court records and the facts and law set forth above, Runyan's § 2255 motion is denied.

SO ORDERED.

Dated March 3, 2005.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ROBERT BEAM RUNYAN,	)	
Movant,	)	
	)	CIVIL ACTION NO.
V.	)	6:04-CV-037-C
UNITED STATES OF AMERICA,	)	(6:99-CR-047-C)
Respondent.	)	

JUDGMENT

(Filed Mar. 3, 2005)

For the reasons stated in the Court's Order of even date,

It is ORDERED, ADJUDGED, AND DECREED that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is DENIED and the above-styled and -numbered cause is DISMISSED with prejudice.

Dated March 3, 2005.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge